UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

CALIFORNIA NEWSPAPERS PARTNERSHIP
d/b/a ANG NEWSPAPERS

and **Case 32-CA-20008**

NORTHERN CALIFORNIA MEDIA WORKERS
GUILD/TYPOGRAPHICAL UNION, LOCAL 39521,
TNG-CWA, ALF-CIO

Amy Berbower, Esq., of Oakland, California,
for the General Counsel
Laurence R. Arnold, Esq., of San Francisco,
California, for the Respondent

DECISION

Statement of the Case

Mary Miller Cracraft, Administrative Law Judge. The General Counsel alleges that California Newspapers Partnership d/b/a ANG Newspapers (Respondent) committed six violations of Section 8(a)(1) of the National Labor Relations Act[1] during two meetings with its employee, Tom Anderson, occurring on August 28 and November 22, 2002.[2] Both meetings took place during the period of contract negotiations between Respondent and Northern California Media Workers Guild/Typographical Union, Local No. 39521, TNG-CWA, AFL-CIO (the Union).[3]

Allegations

Specifically, General Counsel alleges that at a meeting held on August 28, Respondent (1) told Anderson he could not receive a merit raise because of the Union; (2) asked Anderson how he felt about not getting a raise because of the Union; and (3) interrogated Anderson about his opinions of the Union and the status of contract negotiations. Further, General Counsel alleges that at a meeting held on November 22, Respondent (1) told Anderson that he had created a conflict of interest by speaking to the city council on behalf of the Union, (2) solicited a

[1] Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), provides in relevant part that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act, 29 U.S.C. §157, to self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activity, and to refrain from any such activities.

[2] All dates are in 2002 unless otherwise indicated.

[3] This case was tried in Oakland, California on Thursday and Friday, July 24 and 25, 2003, based upon a charge and amended charge filed by the Union on September 13, 2002, and November 27, 2002, respectively, The General Counsel issued the complaint on January 28, 2003.

grievance by asking Anderson if he was happy working for Respondent, and (3) interrogated Anderson about his opinions of the Union and the status of contract negotiations.

The parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

Findings of Fact

I. Jurisdiction and Labor Organization Status

Respondent, a California partnership, maintains an office and place of business in Pleasanton, California, where it is engaged in the publication and distribution of daily newspapers. During the twelve-month period ending January 28, 2003, Respondent derived gross revenues in excess of $200,000 and during the same time held membership in or subscribed to various interstate news services, published nationally syndicated features, and advertised nationally sold products. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background

Respondent publishes five newspapers in the San Francisco Bay area as follows: The Oakland Tribune, The Tri-Valley Herald, The Hayward Daily Review, The Fremont Argus, and The San Mateo Times. Drew Voros is the business editor for all publications and Mark Stafforini is the deputy business editor for all publications. Tom Anderson was hired in August 2001 as a business reporter for The Fremont Argus. In March 2003, Anderson began writing for the local section of The Fremont Argus.

Respondent and the Union were parties to a collective-bargaining agreement in effect from August 17, 1998 until August 16, 2001. The agreement covered a unit of approximately 200 employees at the five newspapers, including reporters, photographers, copy editors, and other editorial personnel. When the agreement expired, the Union and Respondent began protracted negotiations for a new contract. Near the one-year anniversary of contract expiration, Union members held rallies and picketed outside one of Respondent's offices to protest the lack of progress in reaching a new contract.

III. August 28 Performance Review Meeting

Facts

At about the same time as the one-year anniversary of expiration, on August 28, Anderson met with Voros and Stafforini to discuss his first annual performance review.

[4] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

The parties' expired contract provided for merit increases based upon performance review. A guaranteed merit fund, to be distributed in its entirety, was based upon a percentage of the payroll and minimum merit increase amounts were set forth. The agreement specifically provided,

> However, upon the expiration or termination of this Agreement, unless it is extended beyond its term by a specific written agreement signed by the parties, [Respondent] shall be under no obligation to grant merit increases to any employee until a new agreement is reached.

There is no evidence that the agreement had been extended.

The three participants in the performance review presentation agree that Voros read Anderson's review and told Anderson it was the best review he had given any employee that year. At this point, the testimony of the three diverges.

Anderson testified that Voros said he would like to give Anderson a raise but "my hands are tied, I'd really like to give you a raise but I can't because of union bargaining." Anderson further testified that Voros said he would fight to get a raise for Anderson. Voros asked Anderson how he felt about that and Anderson expressed disappointment. According to Anderson, Voros then asked how Anderson felt about the current status of negotiations: the Union opposed mediation and Respondent wanted mediation. Anderson responded noncommittally.

Voros testified that he told Anderson he could not give him a raise because there was no contract. Voros explained that Respondent was not giving raises because there was no mechanism in place for giving raises. However, Voros opined that there were always exceptions to the rule and he would request that Anderson be made an exception. Voros continued that from his standpoint, it appeared that contract negotiations were at a standstill and that one of the sticking points was whether to utilize mediation. Voros expressed frustration at the failure to agree on use of mediation so that negotiations could continue and good employees like Anderson could be rewarded. Voros denied that he told Anderson he was not getting a raise because of the union or the union's position in bargaining. Voros denied that he asked Anderson what he thought about the fact that he was not getting a raise because of the union and denied that he asked Anderson what he thought about the status of negotiations.

Stafforini recalled that Voros told Anderson that despite the strong review, unfortunately management had informed him "that because there was no contract with the union and because there was no official mechanism for giving raises," Respondent decided not to give raises. Stafforini recalled that Voros said he would try to persuade the executive editor to make an exception for Anderson. Voros told Anderson he felt bad about this but he was "stuck in the middle and there wasn't much he could do about it." Voros suggested that Anderson might want to talk with the Union about pursuing mediation to move things along. Stafforini denied that Voros or he asked Anderson what he thought about negotiations, how Anderson felt about not getting a raise, or told Anderson he was not getting a raise because of the union.

Credibility Resolution

All three of the witnesses exhibited impressive testimonial demeanor coupled with extremely thoughtful, detailed recollections. Moreover, the testimony of the three witnesses is very similar. Anderson's testimony differs from that of Stafforini and Voros only with respect to

the exact language utilized in discussing his not receiving a raise. Of course, Anderson, a current employee, may be accorded enhanced credibility because he was testifying against his economic self-interest. See, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 n. 2 (1961). However, this is only one factor to be considered. *Flexsteel Industries, Inc.,* 316 NLRB 745 (1995). Because these facts arose in the midst of protracted, somewhat bitter negotiations, which polarized the parties, I have determined that current employee status does not provide enhanced credibility in this case.

Based upon testimonial demeanor, I credit the testimony of Stafforini over that of Anderson and Voros, when there is a conflict. Additionally, as to testimonial content, I note that all three witnesses testified in free narrative. Both Voros' and Anderson's testimony, in this form, was highly scripted and well organized, as if their memories had solidified over time. I conclude that both were completely genuine in their beliefs but that their memories had naturally evolved as time elapsed. Stafforini, on the other hand, exhibited gaps in his memory. Thus, his testimony was fresher and more believable.

Analysis

Based upon this credibility resolution, I find that Respondent did not ask Anderson how he felt about not getting a raise because of the Union and did not interrogate Anderson about his opinions about the Union and about the status of contract negotiations. Moreover, I find that Respondent did not tell Anderson that he would not receive a raise because of the Union. Rather, Voros told Anderson that he would not receive a raise because there was no contract with the Union and no official mechanism in place for giving raises.

Further, I conclude that in telling Anderson that Respondent's policy was that no raises would be given because there was no contract and no official mechanism in place for giving raises, Voros was merely stating the parties' agreement that Respondent was under no obligation to grant merit increases until a new agreement was reached. This does not rise to the level of blaming the Union for failure to award a merit increase to Anderson.

IV. October 22 City Council Meeting

On October 22, Anderson attended a Fremont City Council meeting. Anderson addressed the City Council as a representative of the Union. He asked the City Council to support a resolution in favor of the Union in the ongoing negotiations with Respondent. Anderson was not working at the time; he did not wear a press badge, and did not sit at the press table. Anderson did not regularly attend City Council meetings as a business reporter. However, he had interviewed city government employees and officials, including the mayor and at least one council member, as part of his reporting.

V. November 22 Meeting

Facts

On November 22, Anderson met with Voros and Stafforini at Respondent's Pleasanton office. By this time, Anderson had received a raise based on Voros' efforts to create an exception to Respondent's policy. Anderson was told that the reason for going to Pleasanton was to review a story. There is no dispute that in the ensuing meeting, attended by Voros, Stafforini, and Anderson, Voros admonished Anderson that his remarks to the City Council could create a perception of conflict of interest, undermining the paper's credibility. The admonition was not a disciplinary action.

According to Anderson, Voros continued the conversation by stating that he knew (from an article Anderson wrote for the Union newsletter) that Anderson did not believe that the parties' current mediation efforts would succeed. Anderson testified that Voros referenced the generous merit increase Anderson had received and asked if Anderson was happy working for Respondent.[5]

Both Voros and Stafforini testified that there was no discussion about the status of negotiations or mediation. Voros and Stafforini denied that either of them asked Anderson if he was happy working for Respondent. Voros and Stafforini recalled that Voros said he hoped Anderson was happy and that the raise had symbolically shown that Respondent believed Anderson was a valuable employee.

Credibility Resolution

For the reasons stated above, I credit Stafforini whenever there is a conflict in the testimony of the three participants in the meeting. Thus, I find that there was no discussion of mediation, Anderson's opinion about the Union, or the status of contract negotiations. Accordingly, the allegations that Respondent solicited a grievance by asking Anderson if he was happy working for Respondent and interrogated Anderson about his opinions of the Union and the status of contract negotiation are dismissed.

Arguments

Counsel for the General Counsel argues that Respondent's admonition of Anderson reasonably tended to restrain, coerce and interfere with protected Union activities. Counsel notes that Anderson's appeal to the City Council was protected because it was not "so disloyal, reckless, or maliciously untrue as to lose the Act's protection," citing *Emarco, Inc.,* 284 NLRB 832, 833 (1987), incorporating *NLRB v. Electrical Workers, IBEW Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953).

Further, counsel notes that application of *Peerless Publications,* 283 NLRB 334 (1987), by analogy, leads to the inescapable conclusion that Respondent's admonition of Anderson is not privileged by editorial integrity. Counsel asserts that Respondent's unwritten "rule" prohibiting reporters from speaking to the City Council to request support for the Union is not narrowly tailored to meet Respondent's legitimate objectives and is vague and ambiguous. Counsel also argues that the rule is not limited in its applicability to affected employees to accomplish the necessarily limited objectives.

Indeed, Respondent does not argue that Anderson's appeal to the City Council exceeded the bounds of protected speech. Rather, Respondent argues that its nondisciplinary admonishment of Anderson was necessary to preserve and protect Respondent's impartiality. In this regard, Respondent asserts that the Act may not be applied to a newspaper in a manner that would circumscribe the "full freedom and liberty" of its First Amendment rights. Thus, Respondent concludes, when editorial concerns are at issue, these concerns override the Act. Respondent relies upon *Associated Press v. NLRB,* 301 U. S. 103 (1937).

Further, Respondent notes that future prohibitions of its employees appearing before the City Council does not silence the voice of the Union because the Union had other individuals

[5] Anderson did not testify that he was interrogated about the Union or about the status of contract negotiations. Accordingly, this allegation is dismissed.

available to address the City Council. Finally, Respondent argues that if a violation is found, the remedy may not prohibit it from directing that its editorial employees not engage in activities that pose the potential appearance of a conflict of interest, including those that happen to be union-related.

Analysis

In *Peerless Publications,* 283 NLRB 334 (1987), on remand, *Newspaper Guild Local 10 (Peerless Publications) v. NLRB,* 636 F.2d 550, 562 (D.C. Cir. 1980), the Board noted that "editorial integrity of a newspaper lies at the core of publishing control." Pursuant to this philosophy, the Board held that a newspaper could unilaterally implement a code of ethics, including disciplinary provisions.

> In order to preserve such, a news publication is free to establish reasonable rules designed to prevent its employees from engaging in activity which would "directly compromise their standing as responsible journalists and that of the publication for which they work as a medium of integrity," without necessarily being required to bargain initially. It follows from this privilege – which is directly incident to a newspaper's integrity – that the newspaper will be similarly exempt from mandatory bargaining about disciplinary action for employee breach of the basic rule. It must be emphasized, however, that "[t]he degree of control which may be exercised by a publication in this regard is not open-ended, but must be narrowly tailored to the protection of the core purposes of the enterprise."

Id., 283 NLRB at 335. *Peerless Publications* has been limited in its application outside the unique context of the newspaper industry. *King Soopers,* 340 NLRB No. 75, slip opinion at 1-2 (Sept. 30, 2003); *Edgar P. Benjamin Healthcare Center,* 322 NLRB 750, 752 (1996); *W-I Forest Products Co.,* 304 NLRB 957, 958-959 (1991).

The Board held in *Peerless Publications* that in order to escape a duty to bargain regarding a code of ethics, the provisions must address the "protection of the core purposes of the enterprise." Thus, the rule must be,

> (1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

283 NLRB at 335. Additionally, the Board noted a balancing test established by the court, on remand, as follows:

> Moreover, when there is a conflict between an employer's freedom to manage his business in areas involving the basic direction of the enterprise and the right of the employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck, if possible, which will take [into] account [the] relative importance of the proposed actions to the two parties.

Newspaper Guild Local 10 (Peerless Publications) v. NLRB, 636 F.2d 550, 562 (D.C. Cir. 1980), citing *Machinists Local 1304 (Fibreboard Corp.) v. NLRB,* 379 U.S. 203, 223 (1964), and *Chemical Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 179 (1971).

In *Cincinnati Suburban Press,* 289 NLRB 966, n. 2 (1988), the Board applied *Peerless Publications* to a Section 8(a)(1) finding as follows:

> We agree with the judge that the Respondent violated Sec. 8(a)(1) by maintaining rules 18 and 29. We make clear, however, that the Respondent may adopt rules in which the content of the rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable; provided, however, that such rules do not improperly impinge on the relevant rights of the affected employees. See *Peerless Publications,* 283 NLRB 334 (1987).

Thus, in *Cincinnati Suburban Press,* the Board apparently adopted the balancing test set forth in Newspaper Guild Local 10 v. NLRB, *supra,* 636 F.2d at 562, and extended application of *Peerless Publications* to Section 8(a)(1) analysis. Although the Board subsequently overruled *Cincinnati Suburban Press* to the extent that footnote 2 might be read as a finding that mere maintenance alone of the rules at issue therein was unlawful, the Board did not disavow its adoption of *Peerless Plywood* as a mode of analysis. See, *Lafayette Park Hotel*, 326 NLRB 824, 827 and n. 13 (1998).

Guided by *Peerless Publications*, I find that Respondent's admonition of Anderson interfered with, restrained, and coerced exercise of Section 7 rights because the admonition was not narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objectives, without being overly broad, vague, or ambiguous. Nor was the admonition appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

Initially, it must be noted that Respondent does not maintain a written rule delineating appearance of a conflict of interest. Thus, the oral admonition stands alone. The oral admonition to Anderson was unclear with regard to limitation to particularly affected employees. Does it apply to Anderson alone? Does it apply to all employees in the bargaining unit? Moreover, the oral admonition was ambiguous and overly broad. In admonishing Anderson, Voros referenced the appearance of a conflict of interest arising from asking a favor of a news source. Such a description is not sufficiently tailored to meet Respondent's legitimate and necessary objectives. Due to the potentially broad coverage and the failure to unambiguously and narrowly tailor the admonition, it improperly impinged on employee Section 7 rights.

Were the facts of this case analyzed pursuant to traditional Section 8(a)(1) doctrine, I would similarly find that Voros' statement reasonably tended to interfere with the exercise of Section 7 rights. Examining the totality of the circumstances, Voros' statement implied that Anderson's communication with a third party about the ongoing labor dispute resulted in detriment to Anderson's reporting integrity as well as that of the newspaper. Voros made the statement in a private meeting, the purpose of which was concealed from Anderson, who was under the impression that he was called to Pleasanton to review a story. Neither Voros nor Stafforini suggested an alternative method of soliciting support from the City Council in a manner which the Respondent would find did not create the appearance of a conflict of interest. Thus, Voros' statement reasonably tended to interfere with Anderson's exercise of Section 7 rights.

Conclusion of Law

By admonishing Anderson that he had created the appearance of a conflict of interest by speaking to the city council on behalf of the Union, Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 rights because the admonition was not narrowly tailored in terms of substance, to meet with particularity only Respondent's legitimate and necessary objectives, without being overly broad, vague, or ambiguous and the admonition was not appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

Respondent, California Newspapers Partnership d/b/a ANG Newspapers, Pleasanton, California, its officers, agents, successors, and assigns, shall cease and desist from admonishing Tom Anderson or any other employee that he created the appearance of a conflict of interest by speaking to the city council on behalf of the Union without narrowly tailoring the substance of the admonition to meet with particularity only Respondent's legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives of Respondent; or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Respondent shall take the following affirmative action necessary to effectuate the policies of the Act:

Within 14 days after service by the Region, post at its facilities in Fremont and Pleasanton, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2002.

Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated November 6, 2003
San Francisco, California

Mary Miller Cracraft
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT admonish Tom Anderson or any other employee that he or she created the appearance of a conflict of interest by speaking to the city council on behalf of Northern California Media Workers Guild/Typographical Union Local No. 39521, TNG-CWA, AFL-CIO, unless we narrowly tailor the admonition in terms of substance, to meet with particularity only our legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives.

.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CALIFORNIA NEWSPAPERS PARTNERSHIP
d/b/a ANG NEWSPAPERS
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.